93-616

No. _____

Supreme Court, U.S.
FILED
JUL 27 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Petitioner,

vs.

THE OKLAHOMA TAX COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the land of The United Keetoowah Band of Cherokee Indians in Oklahoma, which was purchased by the Band in fee with a restriction against alienation by operation of its corporate charter and 25 U.S.C. § 177, Indian country?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The United Keetoowah Band of Cherokee Indians in Oklahoma (hereinafter the UKB), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit wherein the lands of the UKB were held not to be Indian country which holding is not in accord with decisions of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Sonny Buzzard et al. and The United Keetoowah Band of Cherokee Indians in Oklahoma, a Federally Recognized Indian Band v. The Oklahoma Tax Commission, et al.*, ___ F.2d ___ (10th Cir. 1993) and appears in Appendix A to this Petition. The opinion of the District Court for the Northern District of Oklahoma appears in Appendix B to this Petition.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its judgment in this case on April 28, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Oklahoma Indian Welfare Act of 1936, 49 Stat. 1967, 25 U.S.C. § 503, is set forth in Appendix C.

STATEMENT OF THE CASE

The UKB is a band of Cherokee Indians organized pursuant to the Oklahoma Indian Welfare Act (OIWA) of 1936, 49 Stat. 1967, 25 U.S.C. § 503. The constitution and corporate charter of the UKB was approved by the Secretary of the Interior in 1950 as authorized by the Congress

of the United States by the Oklahoma Indian Welfare Act of 1936.

The corporate charter of the UKB authorizes the acquisition of land but with a restriction against alienation. The UKB did acquire land in compliance with its corporate charter. It is the position of the UKB that the acquired land is Indian Country and further that the acquired land falls within 25 U.S.C. § 177. The significance of Indian Country status is that the land would be outside of the jurisdiction of the State of Oklahoma and outside of the taxing authority of the Oklahoma Tax Commission's authority.

The District Court for the Northern District of Oklahoma held that the land acquired by the UKB does have a restriction against alienation but did not constitute Indian Country and that 25 U.S.C. § 477 provides the congressional consent required pursuant to 25 U.S.C § 177. The 10th Circuit Court of Appeals held that the land has a restriction against alienation and requires the approval of the Secretary of the Interior for alienation but is not Indian Country. The court concluded: "Whether the restraint against alienation stems from the UKB's tribal charter or 25 U.S.C. § 177, it is insufficient by itself to establish that land purchased by the UKB has been set apart for the UKB's use under the superintendence of the government".

REASONS FOR GRANTING THE WRIT

The decisions of the lower courts is in conflict with the decisions of the Supreme Court of the United States.

This Court has discussed Indian Country in two recent cases, *Oklahoma Tax Commission v. Sac and Fox Nation*, ___ U.S. ___, 113 S.Ct. 1985 (1993), and *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, ___ U.S. ___ 111 S.Ct. 905 (1991). A third case relevant to this Petition is *United States v. Sandoval* 231 U.S. 28 (1913). It is the application of the principles enunciated by the Court in these cases that should cause the Court to grant certiorari.

In the *Sac and Fox* case the Court quoted, at page 1991, as follows:

. . .

> Accord, F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions was to designate as Indian country all lands set aside *by whatever means* for the residence of tribal Indians under federal protection, together with trust and restricted Indian allottments"]; *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P. 2d 625, 629 (Okla. 1983) (same)). (emphasis mine)

In *Potawatomi* the Court said:

> In *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L. ed. 2d 489 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether the land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendency of the government."

In *Sandoval,* the key to determining whether the Pueblo settlement constituted "Indian country" was not the status of the land upon which it was situated, the Pueblo held the land in fee, but the manner in which they have been treated by the executive and legislative branches of the federal government. In *Sandoval* the Court concludes that the land is Indian country and said:

> . . . they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities. These public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction, agents and superintendents have been provided to guard their interest, central training and day schools at the pueblos have been established. . . . (at pp. 39-40)

The three principles of: (1) tribal lands acquired by whatever means, (2) the superintendency of the United States government over the lands and (3) being treated by the United States as requiring special consideration and protection are the controlling principles regarding Indian country. In two of the cases cited the Oklahoma Tax Commission was a party and is a party in the instant case.

Restricted lands are lands that are titled to the tribe or individual with a restriction against alienation. The land regulations of the Bureau of Indian Affairs recognize this distinction, 25 CFR § 151.1, § 152.1(c), § 162.1(c), § 163.1, § 166.1(h), and § 169(d):

> These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status

> for individual Indians and tribes. *Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition.* (emphasis mine) . . .
>
> * * *
>
> (e) "Restricted land" or "land in restricted status" means land and title to which is held by an individual Indian or tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations. 25 CFR § 151.2 (e).

It is the Petitioner's position that the lands of the UKB are restricted lands and the lower courts acknowledge this restriction. Petitioner asserts that its restricted lands are under the superintendency of the government because the alienation of Petitioner's lands can only be accomplished by approval of the Secretary of the Interior.

25 U.S.C. § 476 of the Indian Reorganization Act of 1934 (IRA) " . . . authorizes tribes organized under it to prevent alienation of tribal land, a provision supplemented by prohibitions against alienation contained in tribal constitutions and charters adopted under the Act." Cohen, *Handbook of Federal Indian Law,* (1982 ed.) p. 517.

The legislative scheme of the IRA and the OIWA was to empower the Secretary of the Interior to make arrangements with the various Indian tribes and to develop constitutions and charters that contained some or all of

the powers contained in the Acts. The UKB adopted a constitution and charter in this manner and the documents contain the powers agreed upon between the Secretary of the Interior and the UKB which are based upon the legislative enactments of the IRA and the OIWA.

One of the powers contained in the IRA at 25 U.S.C. § 476 is: " . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; . . . . " The OIWA gave the discretion to the Secretary of the Interior to enter into a charter of incorporation with the UKB and for the charter to contain the powers of the IRA. (see 25 U.S.C. § 503)

The important point to be made is that the legislation provided the authority for agreements to be made between the Secretary of the Interior and the UKB. These agreements took the form of a constitution and corporate charter. The provision of the corporate charter which contains a restriction against alienation of tribal land is based in the federal statute. Once the Secretary approved this provision it took on the force and effect of federal law. Section 477 contains the language that, "Any charter so issued shall not be revoked or surrendered except by Act of Congress." This provision applies to the UKB by operation of 25 U.S.C. § 503 and the language is contained in the UKB charter at Article 8.

When an agreement, the UKB charter, rises to the level that requires an Act of Congress to revoke it, it reaches the level of Federal law as to the UKB. Further, the UKB Charter contains language, that is the approval

language, of the United States Department of the Interior that is instructive:

> All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws and the Charter, if and when ratified by the Band.

This is a directive to federal employees to abide by the provisions of the Charter.

The restriction against alienation of land purchased by the UKB pursuant to its corporate charter places the land " . . . under the superintendence of the Government." This is so because the land cannot be sold or encumbered without the consent of the Government and places the Government in a supervisory role as to the UKB and its land. All that is done by the United States regarding other Indian lands with a restriction against alienation must be done for the UKB land. The lower courts held that the UKB land is restricted land and that the Secretary of the Interior must exercise his superintendency over the land.

25 U.S.C. § 177 APPLIES TO LANDS ACQUIRED BY THE UKB.

The court below misinterprets 25 U.S.C. § 177. The court seems to be saying that § 177 would apply to the UKB lands except for § 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477.

The UKB is organized pursuant to 25 U.S.C. § 503, which is the codification of the relevant part of the Oklahoma Indian Welfare Act of 1936. This law authorizes the formation of corporations and the issuance of a corporate charter. The UKB has been issued a corporate charter

pursuant to this law. 25 U.S.C. § 477 is reached by the following language in 25 U.S.C. § 503:

> Such charter *may* convey to the incorporated group, in addition to any such power which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under sections . . . , 476-478, . . . of this title: . . . . (emphasis mine)

Section 503 contains discretionary language regarding what the charter may contain. Section 477 contains the same language of discretion:

> Such charter *may* convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interest in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority *shall* be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.
>
> (emphasis mine)

The lower court reasons that the language in § 477 authorizing the alienation of corporate property is the congressional approval required by § 177. Because the language is discretionary the corporate charter is the

operative document to determine how the authority was used. The UKB corporate charter enumerates the corporate powers in section 3:

> The United Keetoowah Band of Cherokee Indians in Oklahoma, subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and Bylaws of the Band, and subject to the limitations of sections 4 and 5 of this charter, shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967).
>
> . . .
>
> (r) To purchase, take by gift, bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real or personal.

Section 4 of the corporate charter is a limitation on the corporate powers:

> 4. The foregoing corporate powers shall be subject to the following limitations.
>
> (a) No land belonging to the Band or interest in land shall ever be sold or mortgaged.

The UKB charter contains a restriction against alienation of any land that it acquires. The lower court says that this is a self-imposed restriction. This is a mistake by the lower court because the corporate charter was approved by the Secretary of the Interior by the powers and authority of the Act. This restriction against alienation was a negotiated restriction agreed to by the UKB and the United States government through the Secretary of the

Interior. Therefore, lands acquired by the UKB are acquired with a restriction against alienation, which restriction the lower court acknowledges, by operation of federal law and under the superintendency of the Bureau of Indian Affairs.

CONCLUSION

The UKB is in accord with the three principles established by this Court: First, the lands here acquired in fee by the UKB, Second, the lands have a restriction against alienation and require the superintendency of the United States as any other Indian lands with a restriction against alienation and Third, the UKB are considered a sovereign Indian tribe by the United States requiring special consideration and protection as other Indian tribes are afforded protection.

Further, the lands of the UKB fall with the requirements of 25 U.S.C. § 177 which at a minimum requires the approval of the Secretary of the Interior for the alienation of UKB land.

For these reasons this Court should grant this petition for certiorari to reconcile the principles established by this Court with the holdings of the lower courts in this action.

DATED: July 27, 1993

Respectfully submitted,

MARTIN E. SENECA, JR.
Attorney for Petitioner

APPENDIX A

PUBLISH

(Filed April 28, 1993)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SONNY BUZZARD; GARY FORREST; DAN HAYES; DAYTON HOLT; AUSTIN KETCHER; ROGER LIMORE; NORMAN LITTLEDAVE; BOBBY MAYFIELD; DIANNA MAYFIELD; ADALENE SMITH; ROBERT SMOKE; CAROL STACY; PEGGY STEPP; MARY STIGLETS; TABBIE HESS; UNITED KEETOOWAH SMOKESHOP ASSOCIATION, Unincorporated Indian Organization; J. L. BARNETT, Smokeshop Managers and Licensees,	)	No. 92-50
Plaintiffs,	)	
and	)	
THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS, of Oklahoma, a Federally Recognized Indian Band,	)	
Plaintiff-Appellant,	)	
v.	)	
THE OKLAHOMA TAX COMMISSION; ROBERT ANDERSON, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice-Chairman of the Tax Commission; DON KILPATRICK, Secretary of the Tax Commission; JON D. DOUTHITT, District Attorney for Delaware County, Oklahoma; JIM EARP, Sheriff for	)	

Delaware County, Oklahoma; GERALD HUNTER, District Attorney for Adair, Cherokee, Wagoner & Sequoyah County, Oklahoma; W.A. DREW EDMONDSON, District Attorney for Muskogee County, Oklahoma; PATRICK R. ABITBOL, District Attorney for Rogers, Mayes & Craig Counties, Oklahoma, and their successors in office,

Defendants-Appellees,

THE CHEROKEE NATION and KEETOOWAH SOCIETY,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(D.C. No. 1085-4: 90-C-848-B)

Martin E. Seneca, Jr., Reston, VA, for appellant.

David Allen Miley, Oklahoma Tax Commission, Oklahoma City, OK, and Sue Wycoff, Assistant Attorney General, Oklahoma City, OK, (Susan B. Loving, Attorney General of Okalahoma [sic], and David Hudson, Oklahoma Tax Commission with them on the briefs) for appellee.

James G. Wilcoxen, Wilcoxen, Wilcoxen & Primomo, Muskogee, OK, filed amicus curiae brief for The Cherokee Nation.

Chadwick Smith, Tulsa, OK, filed amicus curiae brief for Keetoowah Society.

Before MOORE, Circuit Judge, GODBOLK, Senior Circuit Judge,* and ANDERSON, Circuit Judge.

GODBOLD, Senior Circuit Judge:

The United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) purchased land subject to a restriction against alienation requiring the approval of the U.S. Secretary of the Interior. This case presents the issue whether the land can be considered Indian country and therefore exempt from state jurisdiction. The UKB, contending that land purchased by it subject to this restriction was Indian country, sought injunctive relief prohibiting Oklahoma[1] from enforcing state tobacco taxing statutes against the UKB's smokeshops.[2] The district court held that the restriction against alienation by itself was insufficient to make the UKB's land Indian country and granted summary judgment to Oklahoma. We agree and affirm the grant of summary judgment.

I. FACTUAL BACKGROUND

The UKB is an Indian tribe organized pursuant to the Oklahoma Indian Welfare Act, § 3, 25 U.S.C. § 503 (1988). It intervened in the action for declaratory relief brought

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* The Honorable John C. Godbold, Senior U.S. Circuit Judge for the Eleventh Circuit, sitting by designation.

[1] The appellees consist of the Oklahoma Tax Commission, several of its officers, and several Oklahoma district attorneys. This opinion refers to them collectively as "Oklahoma."

[2] Smokeshops are retail establishments that sell a variety of tobacco-related products, including cigarettes. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 144-45 (1980).

by the United Keetoowah Smokeshop Association, Sonny Buzzard, and other individuals. The district court granted Oklahoma's motion to dismiss as to all plaintiffs except the UKB, and it is the only appellant.

The UKB's tribal charter permits it to purchase land in fee simple but prohibits the UKB from disposing of land without the approval of the Secretary of the Interior. The UKB operates smokeshops on land purchased by it subject to this restriction. It contended in the district court that cigarette sales made in these smokeshops should not be subject to Oklahoma's state tobacco taxes[3] because the shops were located in Indian country. The UKB asserted that its land should be considered Indian country because both its tribal charter and 25 U.S.C. § 177[4] require it to obtain the approval of the federal government prior to disposing of the land.[5] It reasoned

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[3] Even if land purchased by the UKB were Indian country, however, Oklahoma could require the UKB to collect taxes on cigarette sales to nontribal members. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 111 S. Ct. 905, 911 (1991).

[4] That section provides:

> No purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts . . . to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000.

18 U.S.C. § 177 (1988).

[5] The UKB also asserted that its smokeshops were in Indian country because the land was part of the old Cherokee Indian

that this requirement amounted to sufficient involvement by the federal government to make UKB land " 'validly set apart for the use of the Indians as such, under the superintendency of the Government.' " *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991) (*quoting U.S. v. John*, 437 U.S. 634, 649 (1978)).

The district court held that, regardless of the source of the restraint against alienation, the requirement that the UKB obtain the approval of the federal government prior to disposing its land did not mean that the federal government had set aside the land for the UKB or agreed to serve as superintendent of the land. It therefore concluded that the UKB's land was not Indian country, and the UKB was not entitled to injunctive relief prohibiting Oklahoma from enforcing its tobacco taxes.

II. STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Housing Authority v. U.S.*, 980 F.2d 624, 628 (10th Cir. 1992).

III. DISCUSSION

For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151. *See Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir, 1987), *cert. denied*, 487

Reservation and it is an heir to the Cherokee Nation. The district court held, however, that the UKB is not an heir to the Cherokee Nation and the UKB has not challenged this ruling.

U.S. 1218 (1988). Section 1151 defines Indian country to include: (1) land within the limits of any Indian reservation, 18 U.S.C. § 1151(a); (2) dependent Indian communities, *id.* § 1151(b); and (3) Indian allotments, the Indian titles to which have not been extinguished, *id.* § 1151(c). In addition the Supreme Court has held that Indian country includes land " 'validly set apart for the use of the Indians as such, under the superintendency of the Government.' " *Potawatomi Indian Tribe*, 111 S. Ct. at 910 (*quoting John*, 437 U.S. at 649). Applying this test, the Court has concluded that Indian country includes land designated as an "Indian colony," *U.S. v. McGowan*, 302 U.S. 535, 539 (1938), and land held in trust by the United States for the use of an Indian tribe, *Potawatomi Indian Tribe*, 111 S. Ct. at 910.

In *McGowan* the Supreme Court held that the Reno Indian Colony had been set apart by the government for the use of Indians because it had been purchased by the United States for the purpose of providing lands for needy Indians. *See* 302 U.S. at 537. Similarly, trust land is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, 25 C.F.R. § 151.9 (1992), who must consider, among other things, the Indian's need for the land, *id.* § 151.10(b), and the purposes for which the land will be used, *id.* § 151.10(c). If the request is approved, the United States holds the land as trustee. *Id.* § 151.2(d). Thus, land is "validly set apart for the use of Indians as such" only if the federal government takes some action indicating that the land is designated for use by Indians.

Superintendency over the land requires the active involvement of the federal government. This involvement was shown in *McGowan* by the federal government's retention of title to the land and its regulation of activities in the Colony. 302 U.S. at 538-39. The United States also holds title to trust land, although only as trustee. In addition, before agreeing to acquire trust land, the Secretary must consider several factors including the authority for the transactions, *id.* § 151.10(a), the impact on the state resulting from the removal of the land from the tax rolls, *id.* § 151.10(3), and jurisdictional problems that might arise, *id.* § 151.10(f). These requirements show that, when the federal government agrees to hold land in trust, it is prepared to exert jurisdiction over the land.

The UKB has not shown that its smokeshops are located on land validly set apart for the UKB's use by the federal government. Although it must obtain the Secretary of the Interior's approval before disposing of land, the UKB has the right to acquire land unilaterally. The smokeshops thus were located on land purchased by the UKB in the same manner land purchased by any other property owner. In contrast to the Reno Indian Colony or trust land, title is held by the UKB in fee simple. No action has been taken by the federal government indicating that it set aside the land for use by the UKB. A restriction against alienation requiring government approval may show a desire to protect the UKB from unfair dispositions of its land, *see Federal Power Comm'n v. Tuscadora Indian Nation*, 362 U.S. 99, 119 (1960), but does not of itself indicate that the federal government intended the land to be set aside for the UKB's use.

Nor has the UKB shown that its smokeshops are located on land superintended by the federal government. The federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land. At most it has agreed to approve transactions disposing the land. But the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land. Because the UKB cannot show that its lands were validly set apart for its use under the superintendence of the government, we hold that the UKB's smokeshops are not located in Indian country.

Consideration of the consequences of determining that land is Indian country supports this conclusion. Within Indian country the federal and tribal governments have exclusive jurisdiction over the conduct of Indians and interests in Indian property. *Indian Country, U.S.A.*, 829 F.2d at 973. This limits a state's criminal jurisdiction over activities that occur in Indian country and involve Indians, *see* 18 U.S.C. §§ 1152-1153, and its authority to tax those activities, *see Indian Country*, 829 F.2d at 983-87. If the restriction against alienation were sufficient to make any land purchased by the UKB Indian country, the UKB could remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.

Our conclusion that a restraint against alienation requiring the approval of the Secretary of the Interior is

insufficient by itself to make land purchased by the UKB Indian country does not depend on the source of that restraint. It is agreed that the UKB's tribal charter prohibits the disposition of UKB land without the Secretary's approval. But the parties dispute whether 25 U.S.C. § 177 also requires the UKB to obtain the Secretary's approval.[6] It is not necessary to resolve this dispute. Whether the restraint against alienation stems from the UKB's tribal charter or 25 U.S.C. § 177, it is insufficient by itself to establish that land purchased by the UKB has been set apart for the UKB's use under the superintendence of the government.

AFFIRMED.

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[6] The UKB contends that, in addition to it tribal charter, 25 U.S.C. § 177 requires it to obtain the federal government's approval before it can dispose of its land. Because Congress has expressly stated that tribes organized pursuant to the Oklahoma Indian Welfare Act are permitted to buy and sell real property, *see* 25 U.S.C. § 503 (incorporating 25 U.S.C. § 477), Oklahoma asserts that the UKB's organization pursuant to that Act constitutes the approval required by 25 U.S.C. § 177. Oklahoma therefore contends that only the UKB's tribal charter requires it to obtain the federal government's approval prior to disposing of land.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SONNY BUZZARD, GARY FORREST, DAN HAYES, DAYTON HOLT, AUSTIN KETCHER, ROGER LIMORE, NORMAN LITTLEDAVE, BOBBY MAYFIELD, DIANNA MAYFIELD, ADALENE SMITH, ROBERTA SMOKE, CAROL STACY, PEGGY STEPP, MARY STIGLETS, TABBIE HESS, J. L. BARNETT, Smokeshop Managers and Licensees; THE UNITED KEETOOWAH SMOKESHOP ASSOCIATION, an unincorporated Indian Organization,

Plaintiffs,

v.

THE OKLAHOMA TAX COMMISSION; ROBERT ANDERSON, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission; JON D. DOUTHITT, District Attorney for Delaware and Ottawa Counties, Oklahoma; JIM EARP, Sheriff for Delaware County, Oklahoma; GERALD HUNTER, District Attorney for Adair, Cherokee, Wagoner, and Sequoyah Counties, Oklahoma; W. A. "DREW" EDMONDSON, District Attorney for Muskogee County, Oklahoma; PATRICK R. ABITOL, District Attorney for Rogers, Mayes, and Craig Counties, Oklahoma; and their successors in office,

Defendants.

No. 90-C-848-B

(Filed April 10, 1992)

ORDER

Before the Court is the Motion for Injunction Pending Appeal pursuant to Fed.R.Civ.P. 62(c) filed by the plaintiff, the United Keetoowah Band of Cherokee Indians (the "UKB"). The UKB requests the Court to stay and enjoin the State of Oklahoma, pending appeal, from enforcing its taxing statutes in smokeshops owned and licensed by the UKB and located within the boundaries of the original Cherokee Indian Reservation.

The Court sets the motion for hearing on April 17, 1992 at 10:00 a.m.

IT IS SO ORDERED, this 10th day of April, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SONNY BUZZARD, GARY FORREST, DAN HAYES, DAYTON HOLT, AUSTIN KETCHER, ROGER LIMORE, NORMAN LITTLEDAVE, BOBBY MAYFIELD, DIANNA MAYFIELD, ADALENE SMITH, ROBERTA SMOKE, CAROL STACY, PEGGY STEPP, MARY STIGLETS, TABBIE HESS, J. L. BARNETT, Smokeshop Managers and Licensees; THE UNITED KEETOOWAH SMOKESHOP ASSOCIATION, an unincorporated Indian Organization, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS OF OKLAHOMA, Plaintiffs, v. THE OKLAHOMA TAX COMMISSION; ROBERT ANDERSON, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission; JON D. DOUTHITT, District Attorney for Delaware and Ottawa Counties, Oklahoma; JIM EARP, Sheriff for Delaware County, Oklahoma; GERALD HUNTER, District Attorney for Adair, Cherokee, Wagoner, and Sequoyah Counties, Oklahoma; W. A. "DREW" EDMONDSON, District Attorney for Muskogee County, Oklahoma; PATRICK R. ABITOL, District Attorney for Rogers, Mayes, and Craig Counties, Oklahoma; and their successors in office, Defendants.	No. 90-C-848-B (Filed Feb. 24, 1992)

JUDGMENT

In keeping with the Order Sustaining the Defendants' Motions for Summary Judgment entered this date, Judgment is hereby entered in favor of the Defendants, the Oklahoma Tax Commission; Robert Anderson, Chairman of the Tax Commission; Robert L. Wadley, Vice Chairman of the Tax Commission; and Don Kilpatrick, Secretary of the Tax Commission; Jon D. Douthitt, District Attorney for Delaware and Ottawa Counties, Oklahoma; Gerald Hunter, District Attorney for Adair, Cherokee, Wagoner, and Sequoyah Counties, Oklahoma; W. A. "Drew" Edmondson, District Attorney for Muskogee County, Oklahoma; Patrick R. Abitol, District Attorney for Rogers, Mayes, and Craig Counties, Oklahoma; and their successors in office; and against the Plaintiff, the United Keetoowah Band of Cherokee Indians of Oklahoma. Plaintiff's [sic] action is hereby dismissed. Costs are awarded to said Defendants if timely applied for pursuant to Local Rule 6 and each party is to pay their own respective attorneys' fees.

DATED this 24 day of February, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

Thomas R. Brett
Judge

March 3, 1992

Re: Buzzard v. Oklahoma Tax Commission,
No. 90-C-848-B

To all Counsel of Record:

The attached Amended Order filed on March 3, 1992 is identical in every respect to the Order entered on February 24, 1992 except for the highlighted changes in the first paragraph on page 4:

> The parties agree that the only issue before the Court is whether the subject smokeshops are located in Indian country. The resolution of this issue determines whether the UKB is required to collect and remit state taxes on **tobacco sales.** In *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma,* ___ U.S. ___, 111 S.Ct. 905 (1991), the Supreme Court reaffirmed the doctrine of tribal sovereign immunity when the Court held that the State of Oklahoma could not impose **state** tax on cigarette sales to **tribal** members in a tribal owned convenience store located on land held by the federal government in trust for the tribe. However, the Court also reiterated its decisions in *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville,* 447

U.S. 134 (1980) that Indian retailers in Indian country may be required to collect all applicable state taxes on sales to nontribal members. Therefore, if the subject smokeshops are not located in Indian country, the OTC may assess taxes on tobacco sales to tribal members and non-members alike.

The Judgment remains as filed on the 24th day of February, 1992.

Sincerely yours,

/s/ Thomas R. Brett
Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SONNY BUZZARD, GARY FORREST, DAN HAYES, DAYTON HOLT, AUSTIN KETCHER, ROGER LIMORE, NORMAN LITTLEDAVE, BOBBY MAYFIELD, DIANNA MAYFIELD, ADALENE SMITH, ROBERTA SMOKE, CAROL STACY, PEGGY STEPP, MARY STIGLETS, TABBIE HESS, J. L. BARNETT, Smokeshop Managers and Licensees; THE UNITED KEETOOWAH SMOKESHOP ASSOCIATION, an unincorporated Indian Organization, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS OF OKLAHOMA,	)	No. 90-C-848-B
Plaintiffs,	)	(Filed Mar. 3, 1992)
v.	)	
THE OKLAHOMA TAX COMMISSION; ROBERT ANDERSON, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission; JON D. DOUTHITT, District Attorney for Delaware and Ottawa Counties, Oklahoma; JIM EARP, Sheriff for Delaware County, Oklahoma; GERALD HUNTER, District Attorney for Adair, Cherokee, Wagoner, and Sequoyah Counties, Oklahoma; W. A. "DREW" EDMONDSON, District Attorney for Muskogee County, Oklahoma; PATRICK R. ABITOL, District Attorney for Rogers, Mayes, and Craig Counties, Oklahoma; and their successors in office,	)	
Defendants.	)	

AMENDED ORDER

Before the Court for decision are the Motions for Summary Judgment filed by the Defendants Oklahoma Tax Commission ("OTC"), its named officers, and the Defendants Oklahoma District Attorneys Douthitt, Hunter, Edmondson and Abitol,[1] as well as motion for summary judgment filed by the plaintiff, the United Keetoowah Band of Cherokee Indians ("UKB").

This suit was brought by the United Keetoowah Smokeshop Association ("UKSA"), an unincorporated Indian organization, individual smokeshop managers and licensees, and the UKB. In its Order of May 2, 1991, the Court sustained the defendants' motions to dismiss the individual plaintiffs and the UKSA. The UKB, therefore, is the only remaining plaintiff in this case. In bringing this suit, the UKB seeks injunctive relief prohibiting the enforcement of Oklahoma's tobacco taxing statutes in smokeshops allegedly owned and licensed by the UKB and located within the boundaries of the original Cherokee Indian Reservation.

The Keetoowah Society of Oklahoma Cherokees had existed within the original Cherokee Tribe of Oklahoma since the 1800s as an "organization of full-bloods dedicated to preservation of Indian culture and traditions. It represented the most conservative portion of the Cherokee Indians, and had several specific objectives, including opposition to slavery and subsequent opposition to

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[1] Upon motion of the plaintiffs,the Court dismissed Jim Earp, Sheriff for Delaware County, Oklahoma, on February 11, 1991.

allotment." (PX-AK, Briefing Paper for Deputy Ass't Secretary).[2] When the Keetoowahs later sought recognition by Congress in order to organize as a separate band under the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 ("OIWA"), Congress enacted the Act of August 10, 1946 which stated "[t]hat the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936." (PX-B). In 1950 the UKB organized under the OIWA, adopting a constitution and by-laws, as well as a Corporate Charter. (PX-L and PX-M).

Another descendant of the old Cherokee tribe is the Cherokee Nation. The Cherokee Nation did not avail itself of the right to organize under the OIWA; however, in 1976 the Cherokee Nation adopted a new constitution, its current governing document, which was approved by the Commissioner of Indian Affairs.

Historically, the Bureau of Indian Affairs and the Department of the Interior have recognized the Cherokee Nation as the primary Cherokee tribe. Because the Department of the Interior has determined that the population of the UKB is included in the population base of the Cherokee Nation, the Secretary has designated the Cherokee Nation as the proper recipient of grants and contracts applied for under Public Law 93-638 until the

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[2] The exhibits designated "PX" reference plaintiff's exhibits A through AX in support of plaintiff's motion for preliminary injunctive relief, in opposition to defendant's motion to dismiss as converted to motion for summary judgment and plaintiff's cross motion for summary judgment. (Docket #59).

UKB establishes a "tribal roll to identify its service population, separate and apart from the Cherokee Nation." (PX-AM). Furthermore, the Secretary has refused to take any lands within the boundaries of the original Cherokee Indian Reservation into trust for the UKB without the consent of the Cherokee Nation, and the Cherokee Nation has refused to grant its consent. (PX-AP). It is this compendium of events from which the present controversy arises.

The parties agree that the only issue before the Court is whether the subject smokeshops are located in Indian country. The resolution of this issue determines whether the UKB is required to collect and remit state taxes on tobacco sales. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, ___ U.S. ___, 111 S.Ct. 905 (1991), the Supreme Court reaffirmed the doctrine of tribal sovereign immunity when the Court held that the State of Oklahoma could not impose sales tax on cigarette sales to tribal members in a tribal owned convenience store located on land held by the federal government in trust for the tribe. However, the Court also reiterated its decisions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) that Indian retailers in Indian country may be required to collect all applicable state taxes on sales to nontribal members. Therefore, if the subject smokeshops are not located in Indian country, the OTC may assess taxes on tobacco sales to tribal members and non-members alike.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, 477 U.S. at 317 (1986), it is stated:

> The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts . . . " Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

The UKB states that the following are controverted facts:

> 1. That the land in question upon which the United Keetoowah Band of Cherokee Indians in Oklahoma have located their smoke shops is restricted against alienation and, therefore, Indian Country.
>
> 2. There has been no express legislation disestablishing the boundaries of the old Cherokee Reservation in Oklahoma.

(UKB's Reply Brief, Statement of Controverted Facts) (exhibits omitted). The Court, however, finds that these are matters of law, not issues of fact, and concludes that there are no genuine issues of material fact which would preclude summary judgment.

> The term "Indian country" is defined by statute as
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. §1151. While this statute is included in the federal criminal code governing applicable federal criminal law in Indian country, the Supreme Court has held that the statute's definition of Indian country also applies to issues of federal civil and tribal jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1986); *DeCocteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

The statutory definition of Indian country has been expanded through judicial decision to include land held in trust by the federal government for the benefit of Indian tribes. The Supreme Court recently revisited this broader definition in *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991), in which the Court found that land held in trust for the Potawatomis was Indian country:

> In *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether the land is

> denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."

Id. at 910. *See also Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-68 (10th Cir. 1980).

The UKB does not claim that any of the smokeshop sites are located within dependent Indian communities or on Indian allotments[3] or trust land. The UKB instead argues that it is entitled to exercise tribal sovereignty over the subject lands because (1) they are reservation lands, and the UKB is heir to these unallotted lands within the limits of the original Cherokee Indian Reservation;[4] and (2) these lands, while held by the UKB in fee,

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[3] Although there is some evidence in the record that the smokeshop operated by Roberta Smoke, a former plaintiff in this case, is located on an Indian allotment (Defendant District Attorneys' Brief, Affidavit of Margrett Kelly, Exh.2), the UKB does not claim that any of the subject smokeshops [sic] sites are Indian allotments.

[4] The original Cherokee Indian Reservation was established by several federal treaties including the Treaties of May 6, 1828, 7 Stat. 311, and New Echota of December 29, 1835, 7 Stat. 478, as clarified and/or modified by the Treaty of August 6, 1846, 9 Stat. 871. These reservation lands were later subject to allotment pursuant to the Act of March 1, 1901, 31 Stat. 848, the Act of July 1, 1902, 32 Stat. 716, and the Act of April 26, 1906, 34 Stat. 137. Lands not allotted to the members of the Cherokee tribe or reserved for the use of the tribe as town, church or school sites, were sold on the open market "and the proceeds of such sales deposited in the United States Treasury to the credit of the [Cherokee tribe]." Section 16 of the Act of April 26, 1906, 34 Stat. 137.

are similar to "trust lands," as they are subject to restrictions imposed by 25 U.S.C. §177 and the Charter of the UKB.

(1) The UKB, in essence, argues that the smokeshops [sic] sites which are unallotted lands located within the boundaries of the original Cherokee Indian Reservation transform into Indian country upon the UKB's purchase in fee. The UKB reaches this conclusion reasoning that a) it is one of the bands of Cherokee Indians for whom the original Cherokee Indian Reservation was established; b) the original Cherokee Indian Reservation has never been disestablished; c) Congress recognized the UKB by the Act of August 10, 1946, 60 Stat. 976; and d) the UKB's corporate Charter and Bylaws, issued by the Secretary of the Interior pursuant to Section 3 of the OIWA, 25 U.S.C. §503, recognize the UKB's rights to the original Cherokee Indian Reservation.

The UKB, however, offers no authority to support its claim that it is heir to the original Cherokee Indian Reservation. The Act of August 10, 1946 simply recognizes the UKB as a "band of Indians residing in Oklahoma"; it does not set aside a reservation for the UKB or acknowledge the UKB's jurisdiction over the original Cherokee Indian Reservation. Also, while the Act's recognition of the UKB permitted the UKB to incorporate under Section 3 of the OIWA, nothing in Section 3 creates or recognizes the UKB's claim to the original Cherokee Indian Reservation. Neither does the UKB's Corporate Charter, Constitution

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The UKB, in effect, claims that the unallotted land within the boundaries of the original Cherokee Indian Reservation which it has purchased in fee is reservation land.

or By-Laws grant the UKB jurisdiction over the reservation lands.[5]

Contrary to the UKB's claim, the Secretary of the Interior has determined that the lands within the original Cherokee Indian Reservation are not under the jurisdiction of the UKB:

> The first issue to be addressed is whether the United Keetoowah Band has a reservation as that term is used in the land acquisition regulations. [25 C.F.R. §151.8] We believe it is clear that they do not. The regulations define the term "Indian reservation", in the State of Oklahoma, "as that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 CFR 151.2(f). The United Keetoowah Band has never had a reservation in Oklahoma, and the Band has never exercised independent governing authority over any of the Cherokee Nation's reservations lands. . . . While the [Act of August 10, 1946] recognized the society as a Band for the purposes of organizing under the Oklahoma Indian Welfare Act, it did not create or set aside a reservation for the Band. Neither did it purport to give the newly acknowledged Band any authority to assert jurisdiction over any lands belonging to the Cherokee Nation.

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[5] Section 7 of the Corporate Charter states that "[t]he Band ownership of unallotted lands, whether or not occupied by particular individuals, is hereby expressly recognized." This section, however, merely recognizes UKB's corporate right to own unallotted lands, not its right to assume jurisdiction over the unallotted lands within the boundaries of the original Cherokee Indian Reservation.

(Defendants District Attorneys' Brief in Support of Motion for Summary Judgment, Exhibit 4). Furthermore, as this Court noted in *The United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Dept. of Interior*, No. 90-C-608-B (May 31, 1991), the Secretary has recognized that the original Cherokee Indian Reservation is the former reservation of the Cherokee Nation, not the UKB, thereby necessitating the UKB's procurement of the Cherokee Nation's consent before the Secretary will acquire any such land in trust for the UKB pursuant to 25 U.S.C. §465. *See* 25 C.F.R. §151.8.

The Court, therefore, concludes that UKB has failed to show any treaty or Congressional act establishing UKB's "inherited" right or claim to reservation land within the boundaries of the old Cherokee Indian Reservation.[6]

(2) The UKB also argues that because the subject lands owned by the UKB are restricted against alienation by direct action by Congress in enacting 25 U.S.C. §177 which prohibits the "purchase, grant, lease, or other conveyance of [tribal] lands, or of any title or claims thereto" without congressional authorization, and by the Secretary of Interior through the limitations in the Corporate Charter issued to the UKB pursuant to the OIWA, 25 U.S.C. §503, such land is similar to "trust status" land and therefore should be designated Indian country.

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[6] In so holding, the Court need not reach the issue of whether or not the original Cherokee Indian Reservation has been terminated or disestablished.

The UKB contends that under 25 U.S.C. §177 the UKB must obtain consent of the federal government before the UKB can alienate any of the land it has purchased in fee simple.[7]

The UKB further urges that it is restrained from alienating its land due to the limitation on its power as set forth in the Corporate Charter issued by the Secretary of the Interior. The UKB's power to buy and sell real property is set out in section 3 of the UKB's Corporate Charter:

> The United Keetoowah Band of Cherokee Indians in Oklahoma, subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and Bylaws of the Band, and subject to the limitations of sections 4 and 5 of this Charter, shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act . . .
>
> (*r*) To purchase, take by gift, bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real or personal.

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[7] Section 177, title 25 of the United States Code, is the codification of the Indian Non-Intercourse Acts of 1790 and 1834. In enacting this statute, the Congress was acting in *parens patriae* to protect the tribes from "the practice of state authorized Indian land cessions that had flourished under the Articles of Confederation and during the prior colonial experience." F. Cohen, Handbook of Federal Indian Law 511 (1982); *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) ("The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress . . . ").

However, under section 4 of the Corporate Charter, this power is limited: "No land belong [sic] to the Band or interest in land shall ever be sold or mortgaged." The Corporate Charter also incorporates the statutory requirement of an act of Congress to revoke or surrender the charter.

The Cherokee Nation, appearing as amicus curiae, claims that §177 does not impose restraints on the alienation of the UKB's land because the congressional approval required by §177 has been granted through the enactment of §17 of the IRA, 25 U.S.C. §477, which authorizes Indian tribes organized under the IRA "to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real or personal." The Cherokee Nation argues that because the Secretary of the Interior issued the UKB's Corporate Charter pursuant to §3 of the OIWA, 25 U.S.C. §503, and §17 of the IRA, 25 U.S.C. §477, any restraint imposed by §177 has been removed by Congress.

The defendants also urge that the restraint on alienation in section 4 of the Corporate Charter is self-imposed and does not by itself transform fee simple land to trust land. To so find, they argue, would eviscerate the federal government's power to acquire trust land. Land acquisitions in trust are governed by federal regulations in 25 C.F.R. §151. Section 151.10 sets forth seven factors to be considered by the Secretary of the Interior in evaluating requests for acquisitions of land in trust status:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The defendants argue that if the UKB can create trust land simply by acquiring land in fee simple, the Department of the Interior would not have the power to deny trust status if its consideration of the above factors so counseled.

The Court finds the defendants' argument persuasive. The UKB has the power to purchase land in fee without approval from the federal government. The regulations concerning trust acquisitions, contrarily, vest power in the Secretary of the Interior to determine which land will become trust land and thus, Indian country. The copies of the deeds to the subject tracts reflect that the

lands were granted to the "United Keetoowah Band of Cherokee Indians in Oklahoma," and not to the "United States of America in trust for the United Keetoowah Band of Cherokee Indians in Oklahoma." (attached to Defendant OTC's Brief in support of Motion for Summary Judgment). The Court can only conclude from the record before it that the smokeshop sites at the time of the UKB's purchase had lost any restricted status they may have once had and were therefore subject to state jurisdiction. Furthermore, the UKB has failed to cite any action by the federal government after the UKB's purchase by which the federal government assumed jurisdiction over the subject sites, removing the lands from the jurisdiction of the state. While the Court acknowledges that the UKB is restricted from alienating its fee land, the Court cannot conclude from this that the subject lands are Indian country; that is, that they have been "validly set apart for the use of the Indians as [trust land or reservation] under the superintendence of the government." *Potawatomi*, 111 S.Ct. at 910. The UKB's power to purchase land in fee under its Corporate Charter is not synonymous with the federal government's setting aside land for the use of the UKB, nor does the government's approval before the land can be sold, if any is required, by itself rise to the level of government "superintendence." The Court, therefore, concludes that the restraint on alienation of the UKB's fee land does not create Indian country.

In accordance with the above, the Court holds that the subject smokeshops owned and operated by the UKB are not in Indian country, and are therefore subject to the

taxing authority of the State of Oklahoma.[8] The Court, therefore, sustains the motions for summary judgment filed by the defendants and overrules the motion for summary judgment filed by the UKB.

DATED this 3rd day of March, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT
JUDGE

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[8] In so holding, the Court is not unsympathetic to the plight of the UKB or ignorant of the potential effect of such a ruling on the tribe's self-determination and economic development. The UKB is in the untenable position of being a recognized Indian tribe without land over which to assert tribal sovereignty: the Department of the Interior refuses to acquire UKB's land in trust without the consent of the Cherokee Nation and the Cherokee Nation refuses to grant its consent. Consequently, the dispute is founded in the power struggle between the two tribes of Cherokee Indians. Furthermore, as this Court concluded in *The United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Dept. of Interior*, No. 90-C-608-B (May 31, 1991), the UKB cannot bring suit against the Secretary to compel trust acquisition of its land without the Cherokee Nation's consent to waive its sovereign immunity, as the Cherokee Nation is an indispensable party under Fed.R.Civ.P. 19. Under the present state of the law, it appears that the UKB's only remedy is a political one.

APPENDIX C

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

(R.S. § 2116.)

§ 503. Organization of tribes or bands; constitution; charter; right to participate in revolving credit fund

Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation,

which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however,* That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 468, and 479 of this title: *Provided,* That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

(June 26, 1936, c. 831, § 3, 49 Stat. 1967.)

APPENDIX D

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit

of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(June 18, 1934, c. 576, § 16, 48 Stat. 987; 1970 Reorg.Plan No. 2, § 102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085.)

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

(June 18, 1934, c. 576, § 17, 48 Stat. 988.)

(2)

Supreme Court, U.S.
FILED
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OF THE CLERK

No. 93-616

In The

Supreme Court of the United States

October Term, 1993

THE UNITED KEETOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Petitioner,

v.

THE OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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October Term, 1993

THE UNITED KEETOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Petitioner,

v.

THE OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY THE PETITION SHOULD BE DENIED.

The United Keetowah Band of Cherokee Indians in Oklahoma ("UKB" hereafter) argues that the opinion of the Tenth Circuit Court of Appeals in

this case is in conflict with the decisions of this Court in *Oklahoma Tax Commission v. Sac and Fox Nation*, ____ U.S. ____, May 17, 1993, Case No. 92-259, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and *United States v. Sandoval*, 231 U.S. 28 (1913).

The Tenth Circuit opinion is not in conflict with these decisions and this case is so fact specific as to be an undesirable case for review by this Court. The situation of the UKB is outlined in the lower court opinions attached as Appendix A and B to the petition for certiorari.

Basically, the UKB was recognized as an Indian tribe by the federal government in 1946. Historically, the Bureau of Indian Affairs has recognized the Cherokee Nation as the primary Cherokee tribe and the principal representative of the Cherokee people. Both of these tribes are located within the historical area (former reservation) of the Cherokee Nation in Oklahoma. The UKB has never inhabited a reservation nor have they been awarded any land as Indian Country by the federal government. The Indian Country which does exist in the Cherokee area in Oklahoma is held in trust by the United States for the Cherokee Nation and not the UKB.

The UKB has acquired several tracts of land in Oklahoma in fee simple absolute and has applied to the Bureau of Indian Affairs ("BIA" hereafter) to

transfer these lands into trust. The BIA's decision to accept these lands into trust is entirely discretionary under 25 CFR § 151.1 et seq. and the BIA has refused to acquire the UKB's land in trust without the consent of the Cherokee Nation, which will not give that consent, see District Court's Amended Order, footnote 8 at page 30a in App. B pet. cert. This case has more to do with a political struggle between two Indian tribes than it does with paying cigarette excise taxes to the Oklahoma Tax Commission. This Court would be well advised to deny cert. in this case, if for no other reason than to avoid becoming entangled in local tribal political questions of which this Court is not a proper forum for resolution.

The Tenth Circuit has determined that the fee simple tracts of land held by the UKB have not been set apart by the federal government for tribal use and the federal government has not agreed to maintain any superintendence over the land. The UKB's self-imposed restrictions against alienation do not rise to the level of government supervision. This ruling is consistent with *Sac and Fox* and *Potawatomi* dealing with Indian Country in Oklahoma. The *Sandoval* case is not inconsistent with the Tenth Circuit ruling, however, the extremely unique facts of *Sandoval* make it distinguishable from the facts of this case and for all purposes unhelpful to this inquiry.

The main thrust of the UKB's argument is that pursuant to 25 U.S.C. § 177, the UKB must obtain consent of the federal government before the

UKB can alienate any of the land it has purchased in fee simple. The Commission contends that this argument does not follow the rules governing the federal government's acquisition policies for trust lands held for Indian tribes. To follow the UKB's argument would be to eviscerate the federal government's power to acquire trust land.

Land acquisitions in trust are governed by federal regulations in 25 CFR § 151. Section 151.10 sets forth seven factors to be considered by the Secretary of the Interior in evaluating requests for acquisitions of land in trust status. If the UKB can create trust land simply by acquiring land in fee simple, the Department of the Interior would not have the power to deny trust status if its consideration of those factors so counseled, see District Court Order page 27a-28a pet. cert. Therefore, the UKB's argument that Section 177 provides trust status for its fee simple land title is not legally correct.

CONCLUSION

This case is not appropriate for Supreme Court review because the opinion of the Tenth Circuit is not in conflict with opinions of this Court and because the unique facts of this case which exclusively involve only two tribes in the Eastern part of Oklahoma are so narrow in scope as to counsel against granting cert.

The Tenth Circuit correctly decided this case in light of the applicable statutes and case law.

DATED this _____ day of October, 1993.

Respectfully submitted,

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